

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NO. 27-CA-184730

CHARLES SCHWAB & CO., INC.,

Respondent,

and

MICHELLE HUSTON, an Individual,

Charging Party.

**RESPONDENT'S REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Dated: September 21, 2017

David L. Zwisler, Esq.
Steven R. Reid, Esq.
Ogletree, Deakins, Nash, Smoak, & Stewart, P.C.
1700 Lincoln Street, Suite 4650
Denver, CO 80203
Telephone: 303.764.6800
Facsimile: 303.830.7989
david.zwisler@ogletreedeakins.com
steven.reid@ogletreedeakins.com

Attorneys for Respondent

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INTRODUCTION

Respondent Charles Schwab & Co., Inc. (“Schwab”), pursuant to Rule 102.46(e) of the National Labor Relations Board’s (“NLRB” or “Board”) rules, respectfully submits this Reply Brief in Support of its Exceptions to Administrative Law Judge (“ALJ”) Jeffery Wedekind’s June 26, 2017 Decision (“ALJD”).

In its Answering Brief, General Counsel fails to address a key distinction between all of the cases cited in the ALJD and Schwab’s rule. The contested rule prohibits employees from engaging in “any ‘acts of disrespect . . . , including making disparaging comments to or about co-workers . . . ’ in their interactions or business dealings with clients, co-workers, vendors, and the public.” In all of the relevant cases cited by the ALJ and General Counsel, the Board found the rules unlawful because of some associated restriction on disrespectful conduct or disparaging comments to or about management or the company. In stark contrast, Schwab’s rule does not prohibit disrespectful conduct or disparaging comments to or about management or Schwab. General Counsel’s argument fails to even acknowledge this clear distinction.

Accordingly, the ALJ erred in finding the Schwab rule violated the National Labor Relations Act (“NLRA”) and the ALJD should be reversed.

ARGUMENT

A. Board Decisions Striking Down Employer Rules Prohibiting “Disrespectful” Conduct or “Disparaging” Comments Are Limited to Cases in which the Activity is Directed Toward or About Supervisors and/or the Employer.

The challenged Schwab rule contains no prohibition on disrespectful conduct or disparaging comments toward or about supervisors or Schwab. All of the cases cited in the ALJD and those cited by General Counsel in support of the ALJD’s decision include some

prohibition on disrespectful conduct or disparaging comments toward or about supervisors or the company. For example, in *Component Bar Prods., Inc.*, 364 NLRB No. 140 (2016) and *Casino San Pablo*, 361 NLRB No. 148 (2014), the Board invalidated rules containing an express reference to “insubordination” in conjunction with its prohibition of disrespectful conduct. As Schwab pointed out in its Exceptions Brief, Black’s Law Dictionary defines insubordination as refusal to obey some order from a manager or supervisor. See Black’s Law Dictionary (10th ed. 2014). The rule in *Knauz BMW*, 358 NLRB 1754, 1755 (2012), is also inapposite and easily distinguished from Schwab’s rule as it specifically tied its prohibition of “disrespectful” language to language that “injures the image or reputation of the [employer].”

Similarly, the *Verizon Wireless* decision includes a broad prohibition of “disparaging or misrepresenting the company’s products or services or its employees.” 365 NLRB No. 38, slip op. at 4 (2017) (emphasis added). Similar to *Verizon Wireless*, the rule in *Lily Transp. Corp.*, was found to be unlawful because it expressly prohibited disparaging comments about the company. 362 NLRB No. 54 (2015). General Counsel concedes that the decision in *William Beaumont Hosp.*, 363 NLRB No. 162 (2016) is based upon *Claremont Resort & Spa*, 344 NLRB 832 (2005) in which the Board “found a rule prohibiting negative conversations about employees or managers unlawful.” (Answering Brief, p. 9) (emphasis added). The *William Beaumont* and *Claremont* decisions support Schwab’s position that the Board only prohibits rules limiting disrespectful conduct or disparaging comments when the challenged rule references management or the company. Critically, Schwab’s rule makes no such reference.

General Counsel also unavailingly attempts to draw support from *University Medical Ctr.*, 335 NLRB 1318 (2001). General Counsel cites a portion of the challenged rule from

University Medical Ctr. in an effort to support its position: “a work rule that prohibited ‘disrespectful conduct towards a service integrator, service coordinator or other individual.’” (Answering Brief, p. 10). However, General Counsel fails to provide the entirety of the challenged rule which read, “[i]nsubordination, refusing to follow directions, obey legitimate requests or orders, or other disrespectful conduct towards a service integrator, service coordinator, or other individual.” *University Medical Ctr.*, 335 NLRB at 1320. Accordingly, as with two of the decisions cited in the ALJD, the “other disrespectful conduct” prong of the rule in *University Medical Ctr.* must be read through the lens of the rule’s primary purpose: to prohibit insubordination.

General Counsel also erroneously cites *Chipotle Services LLC*, 364 NLRB No. 72, (2016) in support of its position. A clear reading of the case, however, reveals that *Chipotle Services* actually supports Schwab and its position. Specifically, the rule at issue in *Chipotle Services*, provided, “You may not make disparaging, false, misleading, harassing or discriminatory statements about or relating to Chipotle, our employees, suppliers, customers, competition, or investors.” *Id.* at 7 (emphasis added). Unlike the rule in *Chipotle Services LLC*, Schwab’s rule does not restrict employees’ statements about Schwab.

Finally, General Counsel mistakenly relies on *Hills and Dales Gen. Hosp.* 360 NLRB 611 (2014) in support of its position. Again, General Counsel concedes Schwab’s position that the Board only prohibits rules limiting disrespectful conduct or disparaging comments when the challenged rule references management or the company. The “Board has consistently found that rules prohibiting negative comments about management and coworkers to be unlawful.” (Answering Brief, p. 10) (emphasis added).

The common thread throughout the cases cited by the ALJ and General Counsel is a reference to management and/or the company. Schwab’s rule contains no such prohibition and no reasonable employee could read such a restriction into the text or context of the policy. The Board has not found (and should not find) that rules prohibiting disrespectful conduct or disparaging comments about co-workers or clients—without reference to management— to be unlawful. In fact, the Board has found rules restricting similar conduct not directed at management or the company to be lawful. *See e.g. Boch Honda*, 362 NLRB No. 83 (2015); *Copper River of Boiling Springs, LLC*, 360 NLRB 459 (2014); and *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999).

Although General Counsel would have the Board surmise that an employee *could* read the Schwab rule to reasonably chill protected activity, the Board has uniformly rejected any such speculative assertion. In *Copper River of Boiling Springs, LLC*, 360 NLRB at 471, the Board declined to conclude “that a reasonable employee would read [a] rule to apply to [Section 7] activity simply because the rule *could* be interpreted that way.” (Emphasis in original). *See also Nat’l Dance Inst. – New Mexico, Inc.*, 364 NLRB No. 35 (2016) (“A rule does not violate the Act if a reasonable employee merely *could* conceivably read it as barring Section 7 activity.”). (Emphasis in original).

Unlike the rules at issue in the decisions cited by the ALJ, and the additional decisions cited by General Counsel, Schwab’s rule contains no restrictions on conduct or speech toward or about management, the Company, or their working conditions. Accordingly, Schwab’s employees would not (and could not) reasonably construe Schwab’s rule prohibiting its employees from acts of disrespect or from making disparaging comments about co-workers to

prohibit Section 7 activity. The text and the context of the rule would not allow any employee to reasonably construe a restriction on protected activity. Any finding to the contrary would conflict with *Copper River, Nat'l Dance Inst.*, and *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. N.L.R.B.*, 253 F.3d 19, 26 (D.C. Cir. 2001) (“America’s working men and women are as capable of discussing labor matters in intelligent and generally acceptable language as those lawyers and government employees who . . . condescend to them.”).

CONCLUSION

Schwab’s rule prohibiting acts of disrespect and disparaging comments to or about co-workers does not violate the NLRA. The work rules contained in the decisions cited in the ALJD to support the conclusory assertion that all rules relating to disrespectful conduct and disparaging comments are unlawful under Board precedent are factually distinct from Schwab’s rule. General Counsel fails to address the key factual distinction between Schwab’s rule and the rules at issue in the cases relied upon by the ALJ. Moreover, the additional decisions General Counsel cites support Schwab’s position that the ALJ misapplied Board precedent.

As fully briefed in Schwab’s Exceptions, the *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), reasonably construe standard contradicts both Supreme Court precedent and the Board’s own decisions recognizing the necessity of balancing Section 7 rights with those of employers’ legitimate business interests. Accordingly, the Board should overrule the *Lutheran Heritage* reasonably construe standard. Under either standard, however, Schwab’s rule prohibiting acts of disrespect and disparaging comments to or about co-workers does not violate the NLRA.

Dated September 21, 2017.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "D. Zwisler", with a stylized flourish at the end.

David L. Zwisler
Steven R. Reid
Ogletree, Deakins, Nash, Smoak &
Stewart, P.C.
1700 Lincoln Street, Ste 4650
Denver, CO 80203
Telephone: 303.764.6800
Facsimile: 303.830.7989
david.zwisler@ogletreedeakins.com
steven.reid@ogletreedeakins.com

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

The undersigned certifies that on September 21, 2017, a copy of the foregoing **RESPONDENT'S REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** was electronically filed through the National Labor Board's website and a copy has been served to the following parties in the manner indicated:

Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

Michelle Huston
11970 S. Saunter Lane
Parker, CO 80138-8871
Email: michellehuston3@gmail.com
(Federal Express & E-mail)

Angie Berens, Esq.
NLRB-Region 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294
Email: Angie.Berens@nlrb.gov
(Federal Express & E-mail)

/Mary Alice Lydick

Mary Alice Lydick, Practice Assistant

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